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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1560-50

CONSUMER MAIL ORDER ASSOCIATION OF AMERICA, BOX 1025, JOPLIN, MISSOURI; SILVER ROD OF BALTIMORE, INC., HAVRE DE GRACE, MARYLAND; MARYDEL SALES, INC., MARYDEL, MARYLAND; CASTEN'S INC., ELKTON, MARYLAND; BALSON SALES COMPANY, 7212 BALSON AVENUE, ST. LOUIS, MISSOURI; RUTH G. CLARK, CLARK CIGARETTE SERVICE, LOUISVILLE, KENTUCKY; J. H. WILSON, SR., TRUSTEE, CIGARETTE SALES CO., MURPHY, NORTH CAROLINA; AND THE BONDED TOBACCO COMPANY, INC., 1182 BROADWAY, NEW YORK, NEW YORK, *Plaintiffs*

v.

J. HOWARD MCGRATH, individually and as Attorney General of the United States, *Defendant*

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs submit herewith their statement particularly disclosing the basis on which the Supreme Court has jurisdiction on appeal

to review the final judgment of a three-judge District Court denying an injunction and dismissing the complaint.

Opinion Below

The opinion of the District Court for the District of Columbia is not yet reported. A copy of the amended opinion and of the judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court (dated December 8, 1950) was entered on December 11, 1950. A petition for appeal is presented to the District Court herewith, to wit, on January 4, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United Public Workers of America (CIO)* v. *Mitchell,* 330 U. S. 75; *Ewing* v. *Mytinger & Casselberry Inc.,* 339 U. S. 594; *Morgan* v. *United States,* 298 U. S. 468; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134; *Van Dyke* v. *Geary,* 244 U. S. 39; cf. *Hays* v. *Port of Seattle,* 251 U. S. 233.

Questions Presented

1. May the Congress of the United States require shippers of cigarettes in interstate commerce to forward reports of their shipments to state tax commissioners for the purpose of assisting the states to collect sales and use taxes on such interstate shipments, where the state sales and use taxes in question are invalid as applied to such interstate shipments?

2. Does the Commerce power authorize the Congress to require interstate shippers to report the names of their

customers not to the Federal government but to state taxing authorities of the customer's state?

Statutes Involved

The statute involved is the Jenkins Act, Public Law 363, 81st Congress, which is set forth *in toto* herein:

"AN ACT

"To assist States in collecting sales and use taxes on cigarettes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That as used in this Act the term——

"(a) 'person' means any individual, partnership, corporation, or association;

"(b) 'disposing of' means any transfer for profit;

"(c) 'cigarette' means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco;

"(d) 'licensed distributor' means any person authorized by State statute or regulation to distribute cigarettes at wholesale or retail;

"(e) 'use', in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes;

"(f) 'tobacco tax administrator' means the State official duly authorized to administer the cigarette tax law of a State.

"SEC. 2. Any person selling or disposing of cigarettes in interstate commerce whereby such cigarettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes shall, not later than the 10th day of each month, forward to the tobacco tax

administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every such shipment of cigarettes made during the previous calendar month into said State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

"SEC. 3. Whoever violates the provisions of this Act shall be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than six months, or both." Approved October 19, 1949. Public Law 363—81st Cong.

Statement

a. *The proceedings in the District Court*

The object of the Jenkins Act is stated to be "to assist States in collecting sales and use taxes on cigarettes". It requires shippers to forward to state tax authorities reports of sales in interstate commerce to consumers in each State. There is an exemption for sales to licensed distributors and retailers.

The plaintiffs here consist of an Association of shippers of cigarettes in interstate commerce and seven shippers, all but one of whom are members of the Association. The defendant is the Attorney General of the United States.

The complaint was filed in April 1950. It asked for a declaratory judgment that the Jenkins Act was unconstitutional, for an injunction against its enforcement and for other relief. The defendant moved to dismiss and plaintiffs moved for an injunction *pendente lite*. Affidavits were introduced by both sides. Neither side contradicted the affidavits of the other and there is no dispute as to fact whatever in the record. Pursuant to stipulation the three-judge court considered the matter as on cross motions for summary judgment pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure. On November 30,

the Court issued an opinion, and its Final Judgment (dated December 8, 1950) was entered on December 11, 1950. The court below held that the plaintiffs, except plaintiff Association, had standing to challenge the constitutionality of the Act, but held that the Act is constitutional. Its judgment denied the plaintiffs' motion for injunction and dismissed the complaint. This appeal is taken from the order entered December 11, 1950.

b. *The contentions of the plaintiffs and the opinion of the court below*

The plaintiffs are shippers of cigarettes in interstate commerce whose business, so far as here relevant, is exclusively interstate in character. They complain of the Jenkins Act in two major respects: (1) They allege that the great majority, if not all, of the state laws of their customers' states are invalid insofar as they seek to impose taxes on the interstate shipments, and that Congress could not constitutionally require plaintiffs to make reports to aid the enforcement of the invalid state tax laws; and (2) that it requires them as citizens of one state shipping in interstate commerce to forward reports not to the Federal government but to the officials of the states into which they ship. They allege that this is an invalid use of Federal powers under the Commerce Clause to subject them to the jurisdiction of the consumers' state.

The court below considered it unnecessary to examine the state laws in aid of which the Jenkins Act was passed or to discuss their constitutionality. The opinion justifies the failure to do so by quoting the well-recognized principle set out in *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 352, to the effect that there is no constitutional objection to an Act of Congress adopted "in order to aid the enforcement of *valid* state laws". (Em-

phasis supplied) The principle of the *Kentucky Whip & Collar* case was extended by the Court to include an Act of Congress adopted to aid states in the pursuit of any valid *purpose*. If the "purpose" is valid, the fact that it is carried out in an unconstitutional manner by the various states does not in the Court's view raise any constitutional question. Under this view the Congress is not limited to assisting the enforcement of valid state laws as stated in the *Kentucky Whip & Collar* case but may assist the states to enforce invalid laws adopted in aid of a generally valid *purpose*. Granting this premise, the conclusion of the Court follows from the fact that raising revenue is certainly a valid purpose. The case thus presents a theory of Congressional power never before considered or approved by any court. The language of the Court is as follows:

> "It is no answer that some of the state laws taxing the sale or use of cigarettes might not be valid. There is nothing inherently invalid in such laws. The complaint seeks a declaration that the statute is unconstitutional without regard to its particular application to a particular state.[1] We need not, in this general attack upon the Act, go further than to point out that state policy in this area of taxation may validly be the basis for federal regulation of interstate sales or shipments. Even assuming the invalidity of some existing state laws taxing the sale or use of cigarettes, a matter we do not decide, the validity of the federal

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[1] This statement misapprehends the complaint and the affidavits. Plainly the complaint and affidavits established a right to a judgment of invalidity with respect at least to each state whose laws are invalid, e.g., Balson Sales Co. specifically requested relief from the requirement of reporting to Illinois where the state statute has been judicially declared invalid. It is, of course, true that the basic claim is that so many of the state laws are invalid that the entire statute must fall. But certainly the lesser relief of a declaration of *pro tanto* invalidity is specifically requested.

law remains unaffected, because it has the purpose of aiding generally in the effectuation of valid state policy. It is not necessary to consider the question of the use of federal legislative authority to aid a state purpose or policy of a generally invalid character. For reasons deemed sufficient to Congress, set forth in Sen. R. No. 644, 81st Cong., 1st Sess., pp. 1-2, it has undertaken the present means of assisting the states in their tobacco tax policy, the general validity of which is not in question. It cannot be presumed (*Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 420; *Weber* v. *Freed*, 239 U. S. 325, 329, 330) that Congress was attempting to enforce invalid state law or to aid in an unconstitutional application of valid laws."

The fact that the state sales and use taxes undoubtedly represent a valid tax policy as applied to *intrastate* sales would seem to be irrelevant. The Jenkins Act applies only to *interstate* shipment and seeks to assist the states in collecting taxes on such shipments. But the Court holds the general validity of the taxes in one circumstance makes it permissible for the Congress to aid that policy in entirely different circumstances where state legislation is invalid.

It is difficult to perceive any limit which the above-stated principle puts on the power of Congress to take away property without due process if it be done to assist a state in that unconstitutional objective. The suppression of crime is certainly a valid purpose. Under the decision below Congress could aid the states in a program of illegal searches and seizures or the suppression of freedom of speech provided the general purpose was the laudable and valid one of preserving public order. Such a development is unlikely. The real danger in the present act is that it is the opening wedge for the suppression of all mail order business and for the creation of trade barriers.

States have undoubted power to tax sales of a purely intrastate character. It is equally clear that unless Congress removes the protection of the commerce clause from a commodity, states do not have the power to tax wholly interstate sales. Thus the same tax law may be valid as applied to a local sale and invalid as applied to an interstate sale. This is in fact the situation with respect to the cigarette tax laws here involved. The express purpose of the Jenkins Act is to promote the collection of taxes on interstate sales and only on interstate sales. This is an area in which the taxes are in general plainly unconstitutional under the decisions of the Court. This conclusion is inescapable if the various state laws in aid of which the act was passed are examined by the Court. The Court below is able to reach the conclusion it does only because it refuses to look at the laws or their application. The result is a very substantial extension of the power of Congress beyond the limits set by the *Kentucky Whip & Collar* and related cases.

Of course "it cannot be presumed" without an affirmative showing that Congress was here attempting to enforce invalid state laws or to aid in an unconstitutional application of valid laws. But here that affirmative showing appears from the legislative history itself. When the attention of Congress was called to the fact that the Jenkins Act would have the effect of enforcing invalid laws the following colloquy took place between Senator George, Chairman of the Senate Finance Committee, in charge of the bill and Senator Kilgore (95 Cong. Rec. 14291, 14292, Oct. 5, 1949):

> "Mr. George. The bill has a single purpose, which is to assist the States in collecting State-imposed sales taxes or use taxes on cigarettes. It will be noted at the outset that the purpose of the bill is to assist the

States in collecting State-imposed taxes, either sales taxes or use taxes. My own opinion is—and I do not think it worth while to engage in argument on the point—that the States my not impose a sales tax on anything shipped in interstate commerce; but I believe that undoubtedly the States may impose a use tax. However, whether or not the State can impose either tax, that question is not necessarily involved in this bill, because if no valid State tax can be levied, the utility of the bill ceases. * * *

"Mr. Kilgore. I wish to ask a question: Would the Senator from Georgia object to an amendment to section 2 of the bill, by adding at the end of the section the following:

" 'The memorandum or invoice shall be required to be forwarded to a tobacco-tax administrator of a particular State only if (1) the cigarette-tax law of that State in terms applies to cigarettes shipped in interstate commerce for consumption and (2) the cigarette-tax law of that State may lawfully and constitutionally be applied to such interstate shipment.'

"I seek enlightenment. Does the Senator have objection to such an amendment?

"Mr. George. Yes; I do, because such an amendment is entirely useless. I have already stated that in my opinion—for whatever it may be worth—a sales tax upon an interstate sale, as such, would probably not be sustained by the courts. But a use tax may be sustained."

This colloquy so clearly establishes the fact that Congress did not intend to withdraw from cigarettes the protection of the Commerce Clause that it becomes unnecessary to discuss whether or not putting cigarettes in the classification of an intoxicating liquor or prison made goods would be arbitrary and unreasonable. We submit that in such a situation Congress cannot assist the States in col-

lecting taxes invalid under the Commerce Clause as applied to interstate shipment.

Yet the Jenkins Act was passed with the knowledge that in at least one state the cigarette tax law had been held invalid under the Commerce Clause by the State Supreme Court as applied to interstate shipments. It was also the expressed belief by witnesses and responsible legislators like Senator George that in ten other states of 40 tax states, the local taxes which were exclusively sales taxes could not be applied to the interstate shipments. Further, the present record establishes that not just 11 but at least 30 of the 40 cigarette tax laws are invalid barriers to interstate commerce.

Since the Act has no severability clause it would seem to be void not only in aid of the at least 30 states having invalid laws, but *in toto,* since the Act cannot achieve its purpose if limited to the few states if any which may have valid cigarette tax laws.

The second objection to the Jenkins Act raised by the complaint is that it requires citizens of one state shipping in interstate commerce to forward reports not to the federal government but to the officials of various states into which they ship,—states which have no jurisdiction over the shippers and no power to tax their interstate shipments. The court below brushes this objection aside with the statement that Congress has the right to cooperate with the states. But the method chosen for such cooperation is an intrusion into the independence of the states by making their citizens subject to the jurisdiction of other states to which they owe no allegiance. The Court did not discuss the contention that this was as fundamental a reallocation of power between the state as a transfer of physical territory. *Louisiana* v. *Mississippi,* 202 U. S. 1. Plaintiffs urged that such a reallocation of power cannot be made by the Federal

government under the commerce power, as it could not be done under the taxing power, see *United States* v. *Constantine*, 296 U. S. 287, or under the banking power *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U. S. 315.

c. *The plaintiffs*

The shipper plaintiffs are, except as stated below sellers of cigarettes in interstate commerce, now engaged in such sale. They ship to customers who purchase the cigarettes for consumption and not for resale. Thus three of the plaintiffs, Silver Rod of Baltimore, Inc., Marydel Sales, Inc. and Casten's Inc., operate in the State of Maryland. They ship cigarettes in interstate commerce to residents of other states. Their business is conducted exclusively by mail in interstate commerce. They conduct business only in the State of Maryland and solicit orders exclusively by mail from Maryland. They ship exclusively by mail from Maryland into other states. They have no local business in Maryland or any other state.

Plaintiff Ruth Clark is an individual who is engaged in the business of shipping cigarettes exclusively in interstate commerce with places of business at Louisville, Kentucky and Canton, North Carolina.

The Bonded Tobacco Company, Inc., is a corporation of the State of New York engaged in selling denicotinized cigarettes. 98% of its business is the sale of cigarettes by mail in interstate commerce directly to consumers.

The above-named plaintiffs have all shipped in interstate commerce without compliance with the Jenkins Act. They admit that their activities subject them to the Act if the Act is constitutional.

The record establishes that the enactment of the Jenkins law and the threat of enforcement has resulted in a substantial loss of business to plaintiffs; that their customers

will not buy if they comply with the Jenkins law; and that their business will be destroyed because the convenience and saving of ordering by mail are not sufficient to induce customers to continue to buy if state tax officials are supplied the means to harass them in an attempt to collect taxes not due.

In addition, the record shows that the defendant, the Attorney General of the United States, has threatened to enforce the law and that the penalty of a fine of $1,000 or imprisonment for six months for each violation of the Act involves a substantial threat of injury to plaintiffs. Further, the Attorney General has threatened to bring prosecutions not where each plaintiff does business, but in the states to which he ships, at a distance from his home and where he may be subject to disadvantage in defending himself. Under the theory of the defendant, each month's shipments without reports subjects a plaintiff to prosecution in every state into which he has shipped during the month.

The above-mentioned plaintiffs are all persons who have been engaged in business for many years and have complied with all applicable laws and regulations. They are responsible businessmen in their communities and have failed to comply with the Jenkins Act only because they are advised and believe that the Act is unconstitutional. The record establishes that it is impossible to continue their businesses if compliance with the Jenkins law is required. They have therefore stated under oath that if it should be held by the courts that the Act is constitutional, they will cease and discontinue all action in contravention of the law and no criminal prosecution will be necessary to insure compliance.

The plaintiff Balson Sales Company is a partnership of the State of Missouri. It has limited its sales to the

State of Illinois and in compliance with the Jenkins law had made reports to the Tax Commissioner of that State. These reports have been made at tremendous burden and expense. They have been filed only because the Illinois State Cigarette Tax Law has been held unconstitutional by the State Supreme Court as applied to interstate shipments, and the Illinois tax officials are under an injunction against attempting to collect the state tax on such interstate shipments. Balson Sales Company desires to be relieved of the expense of reporting to the State of Illinois information which is troublesome, expensive for it to compile, and is of no use to the state tax officials of Illinois. It also desires to fill orders from customers in other states which it now refuses to do because of the criminal penalties contained in the Jenkins Act and the threat of its enforcement by defendant.

Plaintiff J. H. Wilson is an individual residing in Murphy, North Carolina. He has since some time subsequent to the passage of the Jenkins Act adopted a system of business which he does not believe requires reports under the Jenkins Act. Nevertheless, several months after the filing of the complaint in this action, an indictment under the Jenkins Act was brought against him by defendant in Baton Rouge, Louisiana, some 600 miles from Murphy, North Carolina, his residence and his sole place of business.

The Questions Are Substantial

The statute whose validity is here attacked is unusual in a number of respects.

(1) This is the first Federal statute to use Federal power over interstate commerce to assist states in the collection of local taxes.

(2) It is the first Federal statute which seeks to assist in the enforcement of state laws regardless of their unconstitutionality.

(3) This is the first Federal statute which subjects citizens of one state to liability to report to officials of another.

(4) This is the first Federal statute passed to promote the erection of trade barriers between states over commodities which still enjoy protection of the Commerce Clause.

The issue is not limited to cigarettes alone. The act sets a novel pattern which its proponents urged as a good precedent to be applied to other commodities. The statute creates a new weapon to destroy the freedom of interstate trade on the basis of the ancient plea of protection of local tax revenues and local merchants against "unfair" interstate competition.

It is not an open attack upon the freedom of interstate trade. It purports to recognize the invalidity of barriers to interstate trade created by local sales and use taxes. See e.g., Carlson, *Interstate Barrier Effects of the Use Tax*, 8 *Law & Contemporary Problems*, 223-225 (1941); 12 TNEC Hearings, pp. 395-396. Yet it creates a device for enforcing those very trade barriers in a manner which precludes attack. The device presented by this Act undermines the principle of the Commerce Clause that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523. The Congress while purportedly recognizing the invalidity of the "rampart of customs duties" created by the sales and use tax laws of the various states has nevertheless created a means of preventing interstate commerce from piercing those ramparts.

A statute of such unusual nature requires careful examination and full consideration by the Supreme Court. The recognized powers of the Congress with respect to the regulation of interstate commerce do not authorize it to act without foundation in law or in an arbitrary or unreasonable manner. This court has recently held that a criminal penalty may not be imposed on the basis of arbitrary presumptions of fact. *Tot* v. *U. S.*, 319 U. S. 463 (1943). There the Court held that the criminal statute could not be drafted on the basis of a presumption "where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them . . ." Similarly, we submit the Congress cannot be indulged the liberty of attempting two inconsistent objectives. Just as a violent presumption of fact contrary to experience invalidated the statute in the *Tot* case, so the internal inconsistency of the present statute renders it invalid. Here the Congress adopted a statute to assist states in collecting sales and use taxes on cigarettes. The sales and use taxes it attempted to assist in enforcing were, at least in large measure, plainly invalid and unconstitutional under the decisions of this Court. To assist states in collecting taxes which the Constitution of the United States forbids them to collect and to destroy private business in the process, is not a valid exercise of Federal power.

The shipments of cigarettes engaged in by the plaintiffs and the sole shipments to which the Act applies are exclusively interstate shipments. They are shipments, the solicitation of which is made by mail in interstate commerce. The shipments themselves are made exclusively by mail in interstate commerce. The shippers have no place of business in the state of the consumer to which the goods are shipped. Such shipments are plainly immune under the Commerce Clause from state sales and license taxes.

McLeod v. *J. E. Dilworth Co.*, 322 U. S. 327; *Nippert* v. *Richmond*, 327 U. S. 416. As we shall see below, under the doctrine of these cases and for other reasons, an overwhelming majority, if not all, of the state cigarette tax laws, are invalid under the Commerce Clause.

They were so invalid prior to the passage of the Jenkins Act and they remain so invalid today.

The Congress did not, as perhaps it might have done, attempt to validate these invalid laws by depriving cigarettes of their character as interstate commerce and subjecting them to state taxing power. Cf., *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *Kentucky Whip & Collar Co.* v. *Illinois Central R. R.*, 299 U. S. 334. The legislative history is plain that Congress did not wish to take such a course. It plainly intended that state laws previously invalid as barriers to interstate commerce should remain invalid. The responsible legislators in charge of the bill recognized that insofar as state laws were so invalid, the bill would have no "utility" in every case of a shipment to states with sales tax laws, unaccompanied by compensating use taxes. An amendment to restrict the operation of the Jenkins Act to assist only valid state laws was rejected. See the discussion between Senators George and Kilgore quoted supra.

Yet the Jenkins Act requires reports of cigarette shipments to all the states with invalid laws for use by them in an attempt to collect taxes not due and to threaten purchasers in interstate commerce into surrendering their right to make interstate purchases from plaintiffs. The Act and the threat of its enforcement have already substantially injured plaintiffs' businesses, and if compliance with the statute is had, plaintiffs' businesses will be completely destroyed. The record establishes what would perhaps be plain in any event, that no merchant can continue in busi-

ness if he must report his customers to a tax collector. The statute is not merely a matter of the Federal government requiring burdensome and troublesome reports to the state which will merely have no "utility". It involves the Federal government in an attempt to enforce requirements serving no legitimate purpose but affirmatively injurious to and destructive of the businesses of plaintiffs.

As we shall see below, it has been established by the record and is incontrovertible as a matter of law that the state laws at least to the extent that they are covered by the affidavits, are invalid. Thus, more than 30 of the outstanding 40 cigarette sales and use taxes have been incontrovertibly established to be invalid as applied to interstate shipment.

The law does not contain the usual severability clause and in fact is not severable. Accordingly, even if only one state law were invalid the entire statute must fall. But here it is not one state, but the overwhelming majority of states, where the cigarette tax laws enforced by aid of the Jenkins Act are invalid either on their face or in operation. In this situation, the Court need not assume the burden of examining each state law. If it is satisfied that a substantial number of state cigarette tax laws are invalid as applied to plaintiffs' interstate shipments, the possibility that in some instances the Jenkins Act aided a valid state law would not save the Act. For certainly no statute without a severability clause can be held valid when a substantial part of its operation is void.

II. The State Laws Are Invalid as Applied to Interstate Shipments

The argument above is based on the invalidity of the state cigarette tax laws as applied to interstate shipment.

A brief analysis of those laws in the light of the record will establish the fact.

1. *Illinois.* The Cigarette Tax Act of Illinois has been held invalid by the highest court of that state as applied to interstate shipments. *Johnson* v. *Daley*, 403 Ill. 338, 83 N. E. 2d 350. An injunction was granted enjoining the state tax commissioner from attempting to collect taxes from persons "who purchased cigarettes by mail order from Indiana dealers for their own use and that of their friends." The opinion of the Supreme Court of Illinois was presented to the Senate Finance Committee (see pp. 32-34, Hearings on H. R. 195). Nevertheless, at the urging, among others, of the Illinois Tax Commissioner (see p. 91 of the Hearings, *supra*), the Jenkins Act was adopted in a form which requires reports of interstate shippers into Illinois. Plaintiff Ruth Clark is subject to a fine and a jail sentence for each month she does not report, whereas Balson Sales Company, to avoid this possibility, is required monthly to go to great trouble and expense to file reports with the State of Illinois showing all shipments into that state. The information furnished the Illinois Tax Commissioner cannot be used for any legitimate purpose because Illinois state officials are under court injunction.

2. *Sales Tax Statutes.* Ten states have statutes levying taxes on the sale of cigarettes.[2] This Court has held in *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, that the state in which a customer lives cannot levy a sales tax on an interstate sale. The shipments involved in this case and the only shipments covered by the Jenkins Act are interstates sales. The situation is strikingly similar to that

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[2] Arizona, Idaho, Kansas, Kentucky, Nevada, North Dakota, Pennsylvania, Utah, Vermont, and Delaware.

described in the *McLeod* case where the Court noted that the sellers' "offices are maintained in Tennessee, the sale is made in Tennessee and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." 323 U. S. at 329. Plainly then, sales by plaintiffs to consumers in these ten states cannot be lawfully taxed under the state laws. Senator George and a number of witnesses in favor of the bill plainly recognized this fact. See Colloquy, quoted *supra*, and testimony of Mary Goode Krone, N. Y. Tax Commissioner at pp. 80, 81 in answering questions of Senator McGrath. Yet the Jenkins Act requires the shippers into these ten states to send reports to the Tax Commissioners of these states. These Tax Commissioners, unlike the Tax Commissioner of Illinois, are not under court injunction. They have expressed an intention to use this information for the purpose of attempting to collect taxes from customers of the plaintiffs, with the result that they will be harassed into ceasing to do business with plaintiffs.

3. *License Tax Laws.* Six other states require consumers who purchase cigarettes in interstate commerce to obtain a local license for the privilege of purchasing in interstate commerce and bringing the cigarettes into the state.[3] The provisions of the Michigan law are typical. A person who imports cigarettes for his own consumption is termed "unclassified acquirer". He must obtain a license at a fee not to exceed $150 and must file regular returns with tax on each shipment received. The requirement of the license for the privilege of importing articles of commerce from a sister state is a direct burden on interstate commerce.

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[3] Iowa, Michigan, Massachusetts, Maine, New Hampshire, and Oklahoma, cf. Mississippi.

It has always been stricken down by decisions of this Court from *Robbins* v. *Shelby County*, 120 U. S. 489 to *Nippert* v. *Richmond*, 327 U. S. 416, and constitutes "the very kind of barrier the Commerce Clause was put in the fundamental law to guard against." *Nippert* case, 327 U. S. at 434.

The discrimination is not only in requiring a license and the filing of subsequent reports. It places interstate business at an additional disadvantage because the customer of the local merchant needs only to pay his money to obtain the merchandise, whereas interstate purchasers under this scheme must engage in troublesome record-keeping and reporting for the privilege of purchasing in interstate commerce.[4-5]

4. *So-Called Use Tax Statutes.* The remainder of the 40 states have statutes which are generally denominated use taxes and purport to tax the use or consumption of cigarettes. Although it is established below that many of these use tax statutes are merely disguised sales taxes subject to the same constitutional invalidity as their more frankly labeled counterparts, we shall first establish that these laws are so drafted, administered and construed as to exclude interstate commerce in cigarettes directly to consumers and to constitute barriers to interstate trade.

(a) *The statutes as administered.* Ruth Clark, Leonard Biel and J. Harvey Wilson have filed affidavits herein. These affidavits by persons who intended to comply with the state laws establish that their attempts were rebuffed and that the State cigarette tax laws are administered to make it virtually impossible to sell cigarettes in interstate commerce directly to consumers. This construction of state statutes has no relation to any concern of the states for

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[4-5] The discrimination against interstate shipments is the same even though the interstate shippers may wish to pay the tax as do plaintiffs, Ruth Clark and The Bonded Tobacco Company. (See *infra*)

revenue because Ruth Clark and Leonard Biel of The Bonded Tobacco Company made every effort to pay the taxes. Nevertheless, they were met with constructions of state statutes by tax authorities which made it plain that the statutes would be applied to prevent interstate traffic with local consumers. All the state "use" tax laws contain an express or implied requirement that cigarette sales be made exclusively through local retail and wholesale outlets and not through the avenues of interstate commerce.

Thus, plaintiff Ruth Clark attempted to collect and pay taxes to the states, although not conceding that taxes were legally due. She entered into correspondence with several states with the purpose of purchasing and affixing state tax stamps. Yet she met with refusal to permit her to conduct her interstate business. Ohio, Florida and New York advised that in order for her to sell in interstate commerce to residents of those states, it would be necessary for her to have a place of business within those states. New York also required a $1,000 bond. Florida stated "We cannot see where you can legally make sales of cigarettes in the State of Florida to individuals living in the State, unless you are operating a retail place of business located within the state." Louisiana met repeated requests for a right to purchase Louisiana tax stamps with complete silence. Georgia stated a list of requirements for the issuance of a license to an out-of-state dealer to purchase tax stamps and stated it was discretionary whether such a license would be issued. Massachusetts denied a license. Michigan also denied a license and demanded that plaintiff appear for a personal interview in Michigan.

The Bonded Tobacco Company, Inc. likewise offered to collect and remit taxes for the states. This company manufactures and sells a special kind of cigarette of low nicotine content which is usually smoked by the consumer on

the recommendation of a physician. Its sales consist exclusively of solicitation by mail and shipment exclusively by mail. 98% of its business is in interstate commerce, the remaining 2% being within the State of New York. It has been in business for 25 years. Its sales are so small in any particular state that it is economically not feasible to use wholesale and retail channels of distribution. Accordingly, unless plaintiff, The Bonded Tobacco Company, can sell by mail, it cannot sell the products it manufactures at all.

The Bonded Tobacco Company is in fact collecting the taxes in all states regardless of whether its taxes are or may properly be applied.

This company likewise met with refusal of the state officials to sanction its interstate business. Texas officials said it could not ship unstamped cigarettes to consumers. Arkansas and Wisconsin advised that shipments could be made only to local wholesalers and retailers and not to consumers. License taxes for the privilege of shipping the cigarettes and paying the tax were required by Idaho, Massachusetts, Montana, North Dakota, Oklahoma, South Dakota. New Hampshire officials stated that customers must obtain licenses to purchase in interstate commerce. Connecticut, Iowa and Minnesota refused to accept the tax from the Bonded Tobacco Company and demanded that each customer pay the tax.

If a shipper desires to pay a tax, he is told that he may not do so, that he must have a license. If he desires to have a license, he is told that it is denied, and that he must have a local place of business. The entire structure is plainly and clearly in violation of the Commerce Clause and a direct attack upon that freedom of traffic between the states which the Commerce Clause was designed to safeguard.

Plainly, these state laws as construed by enforcement officials are requirements that all sales of cigaretts must be made through local distribution channels. Interstate sales are not only discriminated against but prohibited.

(b) *The statutes as written.* In addition, even were the so-called use taxes of states not administered as barriers to interstate commerce in quite the crude manner discussed above, they are in their very nature, an attempt to tax the interstate sale, which is illegal under *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327. Of course, this Court has in some cases sustained use taxes but always subject to the important limitation that they not be merely disguised sales taxes. Thus, in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583, the Court said: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

The tax laws of the various states indicate in substance that it is the interstate sale that is intended to be taxed. No state has a "use tax" which is other than complementary to a sales tax. The laws generally make it plain that the tax is to be paid immediately upon delivery or in a specified time after delivery. The payment of the tax is not conditioned on or limited by the designated use but rather by the receipt of the cigarettes in interstate commerce. Thus, South Dakota [6] requires a consumer-importer to affix a tax stamp immediately upon receipt of the cigarettes; Georgia [7] requires the stamp to be affixed within one hour of receipt; Connecticut,[8] New York,[9] Rhode Is-

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[6] S. Dak. Laws, 1939, Ch. 278, Sec. 4.

[7] Georgia Code, Sec. 92-2211 (B).

[8] Conn. Gen. Stats., Rev. 1949 Sec. 1999.

[9] McKinney's N.Y. Laws Sec. 471-b.

land,[10] and South Carolina [11] require remittance of the use tax within twenty-four hours of receipt.

Such requirements clearly establish that the tax is "upon a use so closely connected with delivery as to be in substance a part thereof." It is thus invalid, when applied to a sale in interstate commerce, as a disguised sales tax. *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327.

If such taxes can be sustained, any invalid sales tax on any commodity can be validated simply by substituting the word "use" for the word "sale" in the statute.

5. *The applicable law.* Discriminations against interstate commerce by the cigarette tax laws of the various states have been set forth above. It would seem necessary merely to refer to a few of the many decisions of this Court outlawing any type of discrimination against interstate competition in favor of local economic interests.

Ward v. *Maryland*, 12 Wall. 418; *Welton* v. *Missouri*, 91 U. S. 275; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511; *H. P. Hood & Sons Inc.* v. *DuMond*, 336 U. S. 525. This consistent policy was expressed in the *Hood* case as follows:

> "*Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." (336 U. S. at 535)

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[10] Rhode Island Laws, 1948, Ch. 2092 Sec. 3.

[11] South Carolina Code (1942) Secs. 2555-2, 2527(7).

The Jenkins Act was sponsored by a combination of local tax authorities and local retailers and wholesalers interested in preserving and fostering their competitive advantage over interstate dealers. (See hearings before Senate Committee on Finance on H. R. 195.) The state tax laws which it is designed to enforce are precisely the type of interstate trade barriers against which the Commerce Clause is directed. Those tax laws are void and illegal under the Commerce Clause as applied to interstate shipments. We submit that the Jenkins Act itself is similarly void as an attempt by the Congress to assist in enforcing invalid laws.

We believe that no state law taxing interstate shipment of cigarettes is valid. However, it is not necessary for the court to examine the laws of each of the forty taxing states. We have established, we believe, that a substantial number of the states, indeed the overwhelming majority of them, have tax laws which may not validly be applied to the type of shipment in which the plaintiffs engage. Accordingly, the Jenkins law is invalid insofar as it attempts to assist these states in collecting their invalid taxes.

Even if it should be held that some of the state tax laws are valid, this would not save the Jenkins law. That Act contains no severability clause. The Congress did not attempt to apply its provisions only to those states which might have valid cigarette tax laws and to withdraw its application from those states whose laws might be invalid. Indeed, it specifically rejected such a distinction. See the quoted statement of Senator George, *supra*. Accordingly, the Act must stand or fall as a whole. It is plain from the fact that the law as applied generally is invalid, that it cannot be preserved in that small group of cases (if indeed they do exist) where the state laws may be held to be valid

as applied to interstate shipments. *International Text-Book Co.* v. *Pigg*, 217 U. S. 91.

III. The Deprivation of Plaintiffs' Property Is Without Due Process

The record establishes that the enforcement of the Jenkins Act will destroy the value of the businesses of the plaintiffs. Customers have already been frightened into cancelling their course of dealings with plaintiffs. The enforcement of the Act will completely destroy the plaintiffs' businesses and the valuable customers' lists and good will built up over many years. The injury is direct, immediate and indeed overwhelming. Whether such an injury could have been inflicted pursuant to a proper Congressional purpose is not here in issue. It is plain that the Jenkins Act imposed this great and immediate burden upon the plaintiffs for purposes which are not permissible. Since the state cigarette tax laws are invalid as applied to interstate shipments it is not a proper purpose of the Congress to supply state officials with the means of harassing plaintiffs' customers into paying taxes not due, and destroying the businesses of the plaintiffs in the process. The Jenkins Act does not adopt reasonable means to a legitimate end but involves unreasonable, arbitrary and capricious action which has no relation to the avowed objective of assisting the states in collecting taxes. It must be stricken down.

IV. The Jenkins Act Is Beyond the Power of the Federal Government Because It Requires Citizens of One State to File Reports With Officials of Another State

The Jenkins Act is unique in the history of federal legislation. It is the first statute ever passed which requires a citizen of one state under penalty of federal law

to submit information, *not to the federal government or any of its agencies,* but to an official of a state of which he is not a citizen. The command of the statute is that a shipper located in Maryland shall "forward to the tobacco tax administrator of the State into which such shipment is made, a memorandum . . ." concerning the shipment. Failure of a Maryland shipper to forward such a memorandum to the tax commissioner of, e.g., the State of Pennsylvania, subjects the Maryland shipper to fine and imprisonment by the Federal government. It is submitted that this statute violates the basic principle of the Federal system and is in violation of the Ninth and Tenth Amendments of the Constitution and the Due Process Clause of the Fifth Amendment.

It must be understood that the constitutional question here involved is not solely a question of a law applicable to interstate shipment of cigarettes. The question is the same as though there were a general statute requiring all shippers in interstate commerce to report each shipment to the state officials of the state of the consignee. Indeed, in the course of the legislative history of the Jenkins Act it was recognized that this statute was a novel one which would create a precedent for future action with respect to other commodities. It was urged by the proponents of the bill that it was a good precedent. Cf. Hearings on H. R. 3345, House Committee on Ways and Means, March 1, 1948, p. 39. Accordingly, we are faced with a question whether the Federal government can require interstate shippers, regardless of the character of the commodities shipped, to report their shipments to the officials of states of which they are not residents and states which have no jurisdiction over them.

When the states joined together in a Federal union their citizens understood that they were undertaking obligations

to the Federal government in addition to their obligations to their own states. But they did not thereby undertake any obligation to any other state of the Union. The individual states did not surrender any rights over their citizens to any other state, but only to the Federal government.

In addition, the states retained a certain independence of the Federal government. The Federal government was given no right whatsoever to add its own sanctions to the laws of the state. Thus, if Maryland law required a Maryland shipper to submit the names of his customers to his *own* state, the Federal government could not impose upon that shipper an additional penalty for a refusal to comply with the law of Maryland. *United States* v. *Constantine*, 296 U. S. 287.[12] Any other conclusion would, as the Court said in the *Constantine* case, "obliterate the distinction between the delegated powers of the Federal government and those reserved to the states and to their citizens. . . . The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority." (296 U. S. at 296).

A fortiori the Federal government could not impose punishment upon a citizen of the State of Maryland for failure to supply information to a state of which he is not a citizen. The Maryland shipper who ships into the State of Pennsylvania has no obligations to Pennsylvania. That state has no jurisdiction over him. The Due Process Clause prohibits it from extending its jurisdiction to him. *Pennoyer* v. *Neff*, 95 U. S. 714. If the State of Pennsylvania were to attempt to require him to report his shipments to that state, the attempt plainly would violate the Due Process Clause of the Fourteenth Amendment. The Federal government cannot lend its sanctions to the attempt to obtain

[12] The dissenting judges did not dissent from this conclusion but only from the holding that the tax involved in the case was a penalty.

such information any more than it can to an attempt by the shipper's home state. *United States* v. *Constantine*, 296 U. S. 287. Federal penalties may be applied only for violation of the requirements of federal law adopted in the interests of the general government. They cannot be applied to punish a citizen of one state who refuses to subject himself to the jurisdiction of a state of which he is not a resident and to supply information to that state.

What is involved here is, in effect, an attempt to reallocate jurisdiction between the States, e.g., of Maryland and Pennsylvania. The Federal government has here intervened to compel a citizen of Maryland to supply information to the State of Pennsylvania as though he were within the jurisdiction of that state. The several states when they joined together under the Constitution surrendered some of their individual sovereignty to the general government for purposes of that general government. They did not surrender it for the purpose of having jurisdiction over their own citizens reallocated to others of the several states.

The Constitution is plain that the Federal government may not tinker with the jurisdiction of the various states. Article IV, Section 3, specifically provides that "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, *without the Consent of the Legislatures of the States concerned* as well as of the Congress." And indeed, this same section provides that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Thus, as to power to apportion physical territory, it is plain that the Constitution stands as a barrier to any

attempt by the Congress to transfer any territory over which one state has "Jurisdiction" to any other state except with the consent of both states involved. In *Louisiana* v. *Mississippi*, 202 U. S. 1, 40, the Supreme Court stated that "Congress, after the admission of Louisiana, could not take away any portion of that State and give it to the State of Mississippi." See also *Kansas* v. *Colorado*, 206 U. S. 46.

Similarly, it is plain that Congress could not transfer any of the jurisdiction of the State of Louisiana to the State of Mississippi. For the power of a state over the physical territory within its borders is not ownership but merely the right of the State to exercise jurisdiction of the territory and of the persons and property thereon. Incorporation of territory within a state confers on it essentially the right to send its agents and officials into that territory and to apply its coercive processes to persons and property therein. Just as Congress could not grant to Mississippi property of the State of Louisiana and could not authorize Mississippi to send its agents into the State of Louisiana, so it cannot send its own marshals and troops into the State of Maryland for the purpose of subjecting citizens of that state and their property to the process of the State of Pennsylvania.

The Commerce power does not endow the Congress with authority to revise the fundamental relationship between the states and Federal government in this manner. Similar attempts have been rejected when brought forth under the guise of exercise of the taxing power, *United States* v. *Constantine*, 296 U. S. 287, or the banking power, *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U. S. 315.

To compel a citizen of one state to supply information to officials of another state is to require him, under penalty of Federal punishment, to acknowledge sovereignty in the

foreign state and to submit himself, to the extent required, to the processes of that state. Nothing more inconsistent with our Federal system of government is conceivable. It is in substance an adoption of state officials as officials of the Federal government and a granting to them of the power of extra-state process denied by this Court ever since *Pennoyer* v. *Neff*, 95 U. S. 714.

The defendant has pointed to situations in which the Federal government has cooperated with the State government in operating Federal institutions, such as post exchanges, and in making available to the states information obtained by the Federal government in collecting its own income and gasoline taxes. It is, of course, desirable for the Federal and State governments to cooperate and there is no constitutional objection to the Federal government making available to the states information it has obtained in the course of the exercise of its own Federal functions. So the information contained in income tax returns required by the Federal government in the exercise of its undoubted taxing powers may be disposed of as the Federal government sees fit. It may, as has been done on occasions in the past, be made public, or it may be made available to state enforcement agencies. It is not this voluntary cooperation which is objected to. Rather it is the coercion of a Federal penalty upon a citizen to require him to report, not to the Federal government pursuant to a legitimate demand related to the exercise of its own powers, but to one of the States, either his own or any other.

For the reasons set forth above, it is inconsistent with the Federal-State system created by the Constitution to impose a penalty under Federal law for failure of a citizen to report to any one of the several states. Under the Constitution a citizen's obligations to report are either to his own state upon penalty imposed by that state alone, or to

the Federal government on penalty imposed by that government, assuming in either case a legitimate purpose for the requirement. The State cannot require reports to the Federal government and the Federal government can not require reports to the State. The very spirit of the Constitution prohibits such confusion and mingling of Federal and State functions. The Jenkins Act is invalid as beyond the power of the Federal government to adopt.

V. The Standing of the Plaintiffs to Sue

Some issue was raised by the defendant on this point in the court below. There is no question that plaintiffs present a clear case for equitable relief. Most of them are violating a Federal statute in the belief that it is unconstitutional. The defendant Attorney General is entrusted with the enforcement of the law and he has threatened to enforce it. He has indicted one of the plaintiffs, he has authorized prosecution of two others and is investigating with a view to further indictments. He proposes to indict in a venue believed to be improper, i.e., not in the place of the plaintiffs' residences but in the many and distant states into which they ship. Plaintiffs are being subjected to the threat of mounting and multiple penalties and great injury to their property as a result of the statute and defendant's threat of enforcement. This is a proper case for a decision as to constitutionality in an equity suit. The court below so held, citing *United Public Workers of America (CIO)* v. *Mitchell*, 330 U. S. 75, 93-94. The present situation is indeed the classic one in which this Court has held that criminal prosecutions may be enjoined. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 621, where this Court stated:

> "A court of equity, said this court in Re Sawyer, 124 U. S. 200, 210, 'has no jurisdiction over the prose-

cution, the punishment, or the pardon of crimes or misdemeanors. . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of common law, or of the executive and administrative department of the government.' Harkrader v. Wadley, 172 U. S. 148, 170; Fitts v. McGhee, 172 U. S. 516, 531; 2 Story, Eq. Jur. Sec. 893. *But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements.* Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 218; Dobbins v. Los Angeles, 195 U. S. 223, 241; Ex parte Young, 209 U. S. 123, 161, 162; Western U. Teleg. Co. v. Andrews, 216 U. S. 165. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands." (Emphasis supplied)

See also *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177; *Terrace* v. *Thompson*, 263 U. S. 197; *Truax* v. *Raich*, 239 U. S. 33; *Western Union Tel. Co.* v. *P. R. Andrews*, 216 U. S. 165; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

Conclusion

The present statute presents an unprecedented exercise of Federal power. The opinion of the court below extends the power of the Congress under the Commerce Clause beyond anything which this court has ever sanctioned. It permits the use of Federal power to help state officials

attempt to collect illegal taxes. It presents a most unusual requirement of forwarding reports not to Federal but to state officials. The questions it presents are important as well as novel. This Court should pass upon them and preserve the limits of Congressional authority.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1560-50

CONSUMER MAIL ORDER ASSOCIATION OF AMERICA, et al., *Plaintiffs*

v.

J. HOWARD MCGRATH, individually and as Attorney General of the United States, *Defendant*

Argued October 2, 1950. Decided November 30, 1950

Arnold, Fortas & Porter, attorneys for plaintiffs.

Honorable James M. McInerney, Assistant Attorney General, and *Messrs. George Morris Fay*, United States Attorney, and *Vincent A. Kleinfeld*, Attorney, Department of Justice, attorneys for defendant.

Before FAHY, Circuit Judge, MCLAUGHLIN, and MATTHEWS, District Judges, holding a statutory three-judge court.

OPINION

Civil No. 1560-50—Consumer Mail Order Association of America, et al., v. J. Howard McGrath, individually and as Attorney General of the United States.

FAHY, *Circuit Judge:* The plaintiff Consumer Mail Order Association of America is in the nature of a trade association to which the other plaintiffs belong. The latter allege that they are engaged exclusively in the business of selling cigarettes in interstate commerce. They sue J. Howard McGrath, individually and as Attorney General of the United States, for a declaratory judgment that the Act of Congress of October 19, 1949, known as the Jenkins

Act,[13] is unconstitutional and for an injunction against its enforcement. The Act requires that any person selling or disposing of cigarettes in interstate commerce, whereby the cigarettes are shipped to other than a distributor licensed by or located in a state taxing the sale or use of cigarettes, shall each month forward to the tobacco tax administrator of the state into which such shipment is made certain information, including the name and address of the person to whom the shipment was made and the brand and the quantity of the cigarettes shipped. Violation of the Act is a misdemeanor punishable by fine of not more than

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[13] "AN ACT

"To assist States in collecting sales and use taxes on cigarettes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That as used in this Act the term—

"(a) 'person' means any individual, partnership, corporation, or association;

"(b) 'disposing of' means any transfer for profit;

"(c) 'cigarette' means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco;

"(d) 'licensed distributor' means any person authorized by State statute or regulation to distribute cigarettes at wholesale or retail;

"(e) 'use', in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes;

"(f) 'tobacco tax administrator' means the State official duly authorized to administer the cigarette tax law of a State.

"SEC. 2. Any person selling or disposing of cigarettes in interstate commerce whereby such cigarettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes shall, not later than the 10th day of each month, forward to the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every such shipment of cigarettes made during the previous calendar month into said State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

"SEC. 3. Whoever violates the provisions of this Act shall be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than six months, or both. Approved October 19, 1949." Public Law 363—81st Cong.

$1,000, or imprisonment of not more than six months, or both.

Plaintiffs filed a motion for an injunction *pendente lite*, supported by affidavits. Defendant filed an opposition, supported by an affidavit. He also moved to dismiss on the ground the court lacked jurisdiction over the subject matter and the complaint failed to state a claim upon which relief could be granted. A three-judge district court was convened pursuant to 28 U. S. C. § 2284.

The parties stipulated that the case be considered as submitted within the terms of Rule 12(b) of the Federal Rules of Civil Procedure. This rule provides that when on a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, with reasonable opportunity to all parties to present all material made pertinent to such motion by Rule 56. It was stipulated further that the submission of the case included a motion for summary judgment by plaintiffs as well as by the defendant. The court has not excluded the affidavits presented and has granted reasonable opportunity to the parties to present any further material desired. This period having expired, the court, as stipulated, considers the case submitted on motion of the plaintiffs and of the defendant for summary judgment in accordance with Rule 12(b) read with Rule 56.

I

It is urged at the outset that judgment of dismissal should be awarded defendant on the ground there is no case or controversy within the judicial power conferred by Article III, § 2 of the Constitution; that only an abstract legal question as to the validity of the Jenkins Act is involved, with no actual dispute between the parties, or any of them, which impinges closely enough upon conduct to raise a justiciable controversy. *Ashwander, et al.* v. *Tennessee Valley Authority, et al.*, 297 U. S. 288, is relied upon. A case or controversy in a constitutional sense is

more than an intellectual difference of opinion about the validity of a statute. The difference must affect conduct or rights in a near and real sense. *Aetna Life Ins. Co.* v. *Hayworth*, 300 U. S. 227; *Maryland Casualty Co.* v. *Pacific Coal and Oil Co.*, 312 U. S. 270, 273. No such controversy appears to us to exist between the plaintiff Consumer Mail Order Association of America and the defendant. The regulations of the Jenkins Act do not apply to the Association. Their effect on it, indirectly through their effect on its members, does not meet the test of a case or controversy of a justiciable character between this plaintiff and the defendant. As to each of the other plaintiffs, however, the impact of the statute and of the decision of the Attorney General to enforce it has immediate and substantial effect upon their conduct. They engage in the very business specifically regulated by the Act—the interstate shipment of cigarettes to consumers in the states to which the shipments are made. The requirements of the Act adversely affects their sales. The pleadings and affidavits demonstrate that the defendant has undertaken the enforcement of the statute. An indictment has been returned against the plaintiff Wilson, at the instance of the defendant. Investigations of other plaintiffs are under way. Controversies of a serious kind exist between these plaintiffs and the defendant bearing directly upon the conduct of the former and upon rights asserted by them with respect to the business in which they are engaged. Some of these plaintiffs, believing the Act to be unconstitutional, are violating it, while others, fearful of the consequence of violation, are restricting their operations, regulated by the Act, until the issue of constitutionality is settled. All these plaintiffs are among those whom the defendant seeks to bring into conformity with the statute. Such differences with defendant are not abstract, as in *Helco Products* v. *McNutt*, —— U. S. App. D. C. ——, 137 F. 2d 681, and *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461-2. These plaintiffs may invoke our decision as to whether they state a cause of action and whether they are entitled

to relief. *United Public Workers, et al.* v. *Mitchell,* 330 U. S. 75, at pp. 89, 90, 91.

II

The relief sought is a declaratory judgment and an injunction to prevent enforcement of the Act. Concluding as hereinafter set forth that the Act is valid, we need not consider whether a court of equity would enjoin enforcement if it were concluded the Act were invalid. *United Public Workers, et al.* v. *Mitchell,* 330 U. S. 75, at p. 93. The Act being constitutional, equitable relief by injunction must be denied in any event. But we think it is within our discretion under the Declaratory Judgment Act to decide the constitutional question, as was done in *United Public Workers, et al.* v. *Mitchell,* 330 U. S. at pp. 93-94, at the instance of the plaintiff Poole therein. Were Wilson alone involved, we would feel impelled otherwise. He is in a position to raise all pertinent questions in the criminal procedings pending against him in Louisiana. Our discretion to declare his rights should not be exercised in the present action. But his co-plaintiffs, other than the Association, do not now have like opportunity, however unwelcome its character. Yet they are either violating the Act by not forwarding the information prescribed by it, or are complying and thereby suffering serious loss of sales, or, as in the case of several plaintiffs, are, under the pressure of the situation, restricting their sales to customers in states without a tax on the sale or use of cigarettes. Our discretion (*Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, 494) we think should be exercised to determine the issue of the validity of the Act so that these parties will know their rights in so far as our decision will enlighten them.

III

We find no constitutional infirmity in the Jenkins Act. By its terms it applies to "Any person selling or disposing of cigarettes in interstate commerce whereby such ciga-

rettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes * * *." It prescribes a requirement of forwarding certain information in connection with carrying on this particular kind of interstate commerce. Unless this requirement is itself subject to some constitutional defect such as arbitrariness, with consequent invalidity under the Due Process Clause of the Fifth Amendment, the regulation is a valid exercise of the Federal commerce power. Congress may prescribe the "rule by which commerce is to be governed." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. The breadth of the power has been frequently expounded by the Supreme Court in recent years. See, for example, *Wickard* v. *Filburn*, 317 U. S. 111, where at p. 120, it is said:

> "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194-195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. *Id.* at 197."

The discussion ten years ago in *United States* v. *Darby*, 312 U. S. 100, overruling *Hammer* v. *Dagenhart*, 247 U. S. 251, states the power in broad terms not since questioned. There the power was exercised to carry out a Congressional policy that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." (312 U. S. at p. 115). "* * * Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." (*Id.*). "* * * the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress." (*Id.*). In the case

at bar the requirement of reports as to certain interstate shipments of cigarettes stands on no less secure constitutional basis. It is true the title of the statute does not refer to it as a regulation of interstate or foreign commerce. It reads, "To assist States in collecting sales and use taxes on cigarettes." But the substantive provisions attach expressly to interstate shipments; and the purpose to assist states as indicated in no manner makes the regulation illegal. The reports are required to be forwarded only to the tobacco tax administrator of the state into which a shipment is made to other than a distributor licensed by or located in a state taxing the sale or use of cigarettes. The information thus has to do with sales made directly to consumers and accordingly is related to the collection of taxes. This well might assist the taxing authorities to prevent resales without payment of tax, or in other respects. The use of the commerce power to aid the several states in this manner is valid. Aside from the fact that the "motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control," *United States* v. *Darby,* supra, at p. 115, "Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; * * *" *Id.* at p. 114.

A detailed review of validity of the exercise of the federal commerce power in aid of state law and policy is contained in *Kentucky Whip & Collar Co.* v. *Illinois Central R. R.,* 299 U. S. 334, sustaining the Act of July 24, 1935, known as the *Ashurst-Sumners Act,* 49 Stat. 494, which made it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any state where the goods were intended to be received or used in violation of its laws. "The fact that it [Congress] has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." (p. 352). See, also, *Clark Distilling Co.* v. *Western Maryland Ry.,*

242 U. S. 311, 323. See, also *Lottery Case,* 188 U. S. 321, 353; *Weber* v. *Freed,* 239 U. S. 325.

As was said by the Circuit Court of Appeals for the Fifth Circuit, in *Griswold* v. *The President of the United States,* 82 F. 2d 922, in discussing the Connally Act of February 22, 1935, 15 U. S. C. A., § 715-715L, prohibiting the shipment in interstate commerce of oil produced in violation of state law, "the act, though passed in aid of state purposes and powers, deals with, and only with, commerce interstate," citing *Clark Distilling Co.* v. *Western Maryland Ry.,* 242 U. S. 311; *Whitfield* v. *Ohio,* 56 S. Ct. 532, 297 U. S. 431; 80 L. E. 778; *Bogle* v. *White,* 61 F. 2d 930; *Brooks* v. *United States,* 267 U. S. 432. See, to like effect, *President of the United States* v. *Artex Refineries Sales Corp.,* 11 F. Supp. 189, (D. C., S. D. Texas).

It is no answer that some of the state laws taxing the sale or use of cigarettes might not be valid. There is nothing inherently invalid in such laws. The complaint seeks a declaration that the statute is unconstitutional without regard to its particular application to a particular state. We need not, in this general attack upon the Act, go further than to point out that state policy in this area of taxation may validly be the basis for Federal regulation of interstate sales or shipments. Even assuming the invalidity of some existing state laws taxing the sale or use of cigarettes, a matter we do not decide, the validity of the Federal law remains unaffected, because it has the purpose of aiding generally in the effectuation of valid state policy. It is not necessary to consider the question of the use of Federal legislative authority to aid a state purpose or policy of a generally invalid character. For reasons deemed sufficient to Congress, set forth in Sen. R. No. 644, 81st Cong., 1st Sess., pp. 1-2, it has undertaken the present means of assisting the states in their tobacco tax policy, the general validity of which is not in question. It cannot be presumed (*Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 430; *Weber* v. *Freed,* 239 U. S. 325, 329, 330) that Congress was attempting to enforce invalid state law or to aid in an unconstitutional application of valid laws.

IV

The constitutionality of the Act is also attacked as a violation of the Due Process Clause of the Fifth Amendment. It is asserted (1) that the purpose of the Act is not to regulate interstate commerce but to aid the states in the enforcement of invalid laws which will destroy plaintiffs' businesses; (2) that the Act, in requiring the disclosure of plaintiffs' mail-order customers, arbitrarily destroys the property value of plaintiff's customer lists; (3) that the Act discriminates against cigarettes as a legitimate article of commerce; and (4) that the Act forces a resident of one state to submit to the jurisdiction of a second state.

(1) The first of these contentions has already been discussed under Part III, *supra*.

(2) While it is beyond dispute that the exercise of the commerce power by Congress is subject to the requirements of the Fifth Amendment, *Currin* v. *Wallace*, 306 U. S. 1, 14; those requirements are generally satisfied where the means of the regulation of commerce are appropriate to a permissible end. *Virginia Ry.* v. *System Fed. No. 40*, 300 U. S. 515. "Even if the prohibition imposed in the exercise of the commerce power results in the destruction of property rights * * * there is no deprivation in violation of the due process clause of the Fifth Amendment unless the regulation imposed is unreasonable." *Wallace* v. *Hudson-Duncan & Co.*, 98 F. 2d 985, 991. Here, the Jenkins Act does not require the full disclosure of the plaintiffs' customer list to anyone. The taxing authorities of each state receive only the names of those customers who are residing within the state's borders. There is no showing that plaintiffs will be harmed by the disclosure of these segmental lists to competitors. In these circumstances it cannot be said that the requirement is unreasonable or inappropriate to the permissible end of Congress to prevent the use of the facilities of interstate commerce in evading or violating state laws. The right of a mail-order concern operating in interstate commerce to maintain the

absolute secrecy of its customer-list is subject to the right of Congress, in the exercise of its commerce power, to require the partial disclosure of that list to state authorities. In *Utah Fuel Co.* v. *Coal Comm'n*, 306 U. S. 56, the Supreme Court sustained the power of Congress to go even further in the exercise of its commerce power by requiring the submission of detailed business information and by authorizing its disclosure to a group among whom were competitors of the informant. The Court there stated, "* * * Obviously publication may be harmful to petitioners, but as Congress had adequate power to authorize it and has used language adequate thereto we can find no sufficient basis for an injunction." Similarly, in *National Fertilizer Assn.* v. *Bradley*, 301 U. S. 178, it was held that due process was not violated by requiring the disclosure of the amount and analysis of each material used in the manufacture of a fertilizer compound, even though compliance would force the manufacturer to reveal secret formulas. While the disclosure there was required by state law and involved the Fourteenth Amendment, it is clear that the Fifth Amendment does not impose greater restraints upon the power of Congress in this respect. *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Bowles* v. *Willingham*, 321 U. S. 503, 518; *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 438.

(3) It is said that the Act discriminates against cigarettes as a legitimate article of commerce in that other goods, and particularly other forms of tobacco, are left free from regulation. But the "Fifth Amendment does not require full and uniform exercise of the Commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field." *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184. Similarly, in *Currin* v. *Wallace*, 306 U. S. 1, a commerce regulation was sustained against a charge of discrimination where those who were subject to regulation were determined not only by the kind of commodity in which they dealt but also by the amount they handled. The present regulation does not go so far.

(4) Finally, as to the contention that the Act forces a resident of one state to submit to the jurisdiction of a second state, it is the power of Congress, not of any state, which requires the information to be submitted. The Act imposes a condition upon the use of the facilities of interstate commerce, and neither obedience nor violation of that condition subjects the plaintiffs to the authority of any state. That the condition is imposed in order to cooperate with the power of the states to tax does not change the situation. "* * * They [Congress and the states] were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least neither could accomplish in isolated exertion." *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 439.

For the reasons stated with respect to the several plaintiffs, judgment is granted for the defendant and the complaint accordingly is

Dismissed.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 508.

CONSUMER MAIL ORDER ASSOCIATION OF AMERICA, SILVER ROD OF BALTIMORE, INC., MARYDEL SALES, INC., ET AL.,
Appellants,

v.

J. HOWARD MCGRATH, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

Appeal From the United States District Court for the District of Columbia.

PETITION FOR REHEARING.

THURMAN ARNOLD,
MILTON V. FREEMAN,
G. DUANE VIETH,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appeal From the United States District Court for the District of Columbia.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellants respectfully petition this honorable Court for rehearing in the above-entitled matter and for full argument after briefs. The summary affirmance of the de-

cision below leaves unresolved a most important problem which the court below did not settle.

The court below decided that it was appropriate to "determine the issue of the validity of the Act so that these parties will know their rights insofar as our decision will enlighten them." (Statement of Jurisdiction, p. 39). Nevertheless, in its opinion the court below did not in fact determine the validity of the Act in the only sense which has meaning for appellants. That court stated "The complaint seeks a declaration that the statute is unconstitutional *without regard to its particular application to a particular state.*" [Italics supplied] It stated that a "general attack" on the statute could not be sustained.

Accordingly, under the opinion below, the appellants are free to raise a question of constitutionality with respect to the particular application of the Act to a particular state in criminal proceedings commenced under the Act. Thus appellant Ruth Clark is subject to possible indictment for failure to file reports with the State of Illinois in connection with her shipments into Illinois although the Illinois Cigarette Tax Act has been declared invalid as applied to interstate commerce. Appellant Balson Sales Company is shipping into Illinois and reporting to the State. It asked the court for a declaration that the Jenkins Act was invalid insofar as it required burdensome and useless reports by appellant Balson Sales Company to the Illinois Tax Commissioner. The complaint (and the affidavits in support thereof) thus contains a specific challenge to the Act in its particular application at least to this particular state.

Similarly, we assume the decision leaves it open for those appellants who are being prosecuted or about to be prosecuted in the various states away from their home to raise the constitutionality of the Jenkins Act insofar as it compels them to report to states whose local cigarette tax laws are invalid as applied to interstate shipments.

It is submitted that in leaving these questions open the court below has not carried out its avowed purpose of let-

ting the appellants "know their rights". This Court by affirmance without discussion has likewise left appellants uninformed of their rights.

It is respectfully submitted that appellants have a right to a complete adjudication on the facts alleged and proved in this action. They should not be relegated to raising in subsequent proceedings issues ripe for adjudication here. The appellants' rights to an adjudication can be satisfied only by a decision of this Court which meets the issue left unresolved by the opinion of the court below. We urge that this Court should give appellants either a firm declaration that the Jenkins Act is constitutional regardless of the invalidity of the law of the particular state to which reports must be forwarded, or that the Act is constitutional only as applied to require reports to states who have valid tax laws. Any other course will result in uncertainty and breed further litigation which would be rendered unnecessary by a declaration by this Court of the scope of its ruling.

WHEREFORE, appellants pray that rehearing be granted, that argument be permitted and that, in any event, this Court render an opinion which will afford appellants the knowledge of their rights which the court below desired them to have, and to which they believe they are entitled.

Respectfully submitted,

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I hereby certify that the attached petition for rehearing is presented in good faith and not for delay.

THURMAN ARNOLD.

No. 508. CONSUMER MAIL ORDER ASSOCIATION OF AMERICA ET AL. *v.* MCGRATH, ATTORNEY GENERAL. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The judgment is affirmed. *Thurman Arnold* and *Milton V. Freeman* for appellants. Reported below: 94 F. Supp. 705.